Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1025

PHILLIP HESS,

Plaintiff-Petitioner

VERSUS

UPPER MISSISSIPPI TOWING CORPORATION, ET AL

Defendants-Appellees

THE PETITION OF PHILLIP HESS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals, rendered September 23, 1977, and appearing at 559 F.2d 1030 (5th Cir. 1077), is reprinted as Appendix A herein. The denial of the petition for rehearing, rendered October 25, 1977, is reprinted as Appendix B. The judgment of the United States District Court, Middle District of Louisiana, granting defendants-appellees' motion for a directed verdict on the 21st day of October, 1975, is reprinted as Appendix C herein.

JURISDICTION

The opinion and judgment of the United States Fifth Circuit Court of Appeals for which this Writ of Certiorari is sought were rendered on September 23, 1977.

The order denying a rehearing by that court was rendered on October 25, 1977.

The jurisdiction of this court over this petition for certiorari is conferred by 28 U.S.C. 1254 (1), which permits review by the United States Supreme Court to any party by writ of certiorari.

QUESTIONS PRESENTED

1. Is an injured harbor worker's cause of action in tort against the owner and operator of a gasoline barge which exploded limited to a 905(b) cause of action or may the injured plaintiff sue the owner and operator in a capacity other than owner and operator of a vessel, such as a corporation engaged in an ultra-hazardous and inherently dangerous business undertaking?
2. Is the General Maritime Law applicable in a 905(b) action?
3. If land-based principles of law are applicable in a tort action under

905(b), do these land-based principles encompass the rules of law set out in Restatement of Torts 2d, §§ 411, 413, 416, 423 and 427?

4. If the Restatement of Torts 2d provisions are applicable in a 905(b) action, do the duties imposed on one who hires an independent contractor to "gas free" a dangerously explosive barge apply to an employee of the independent contractor injured when the barge explodes during gas freeing operations?
5. Does 905(b) permit an action by an injured harbor worker against a barge owner or operator in strict liability where the barge owner and operator are engaged in an ultrahazardous and inherently dangerous business enterprise?

STATUTORY PROVISIONS INVOLVED

1. 33 U.S.C. §905

(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the

contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Restatement of Torts 2d §§ 411, 413, 416, 423 and 427 are presented as Appendix D.

STATEMENT OF THE CASE

This is a maritime personal injury action arising out of the explosion of a gasoline tank barge on September 22, 1973, in which the plaintiff, Phillip Hess, was seriously injured. The barge was owned by Upper Mississippi Towing

Corporation (hereinafter owner) and operated by Penlatex Barge Lines (hereinafter operator), both named as defendants herein.

Prior to the occurrence of the accident, the barge had delivered a cargo of high grade gasoline to Greenville, Mississippi. Pursuant to instructions from the owner of the barge, the operator, after discharge of cargo in Greenville, returned the barge to Port Allen Marine Service, Inc.'s facility located on the Mississippi River below Baton Rouge for "gas freeing", a process whereby the residual cargo is removed from the vessel's tanks. Because of the gasoline vapors in the enclosed tanks of the barge, the barge was classified as "hot", meaning highly explosive, and was described by one witness as a floating bomb. Defendants stipulated that from the time

the barge was delivered into the custody of Port Allen Marine they exercised no safety precautions whatsoever to insure or guard against an explosion. Plaintiff was an employee of Port Allen Marine. During the gas freeing process he was instructed by his employer to "flush" the tanks of the barge by running water through the piping system of the barge. This resulted in the gasoline in the piping system spilling directly onto the hot deck of the barge and it was shortly after this that the explosion occurred. An expert testifying for plaintiff stated that the gas pouring onto the deck of the barge was the probable cause of the explosion. The method employed by Port Allen Marine on the date of the accident, that of flushing the gasoline on the hot deck of the barge, was their usual method of operation. After the accident, however, the method was changed to require the gas

to be flushed into a holding tank. A representative of defendant had previously been present at the Port Allen facility during gas freeing operations.

Defendants had a continuing relationship with Port Allen Marine and at no time did they inquire into the gas freeing procedures utilized by Port Allen Marine nor did they set standards to be followed by Port Allen Marine in gas freeing their barge.

Suit was filed in the Middle District of Louisiana. Although conceding that defendants were engaged in an ultra-hazardous undertaking, at the close of plaintiff's case the Court directed a verdict for defendants. The ruling of the District Court was affirmed by the Fifth Circuit. This application for a Writ of Certiorari followed.

Jurisdiction of the District Court was invoked under 33 U.S.C. 905(b) and

the General Maritime Law.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

Since the 1972 amendments to the Longshoremen and Harbor Workers' Act the lower courts have been attempting to formulate the law to be applied in an action by an injured harbor worker against the owner and operator of a vessel. The decisions are not uniform in their approach. For example:

a. The Third Circuit in Brown v. Ivarans Rederi, A/S, 545 F.2d 854 (1977), has held that "principles of the law of negligence as adopted in the admiralty field during the history of our court" may be applicable in a 905(b) action. The Fifth Circuit in Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977) limits reference only to land-based law.

b. The Fifth Circuit in Gay, supra, incorporated §§ 342, 343 and 343A of the Restatement of Torts 2d as the law applicable under 905(b). The Third Circuit in Brown, supra, rejected the application of these sections for the reason that they are based on assumption of risk, the application of which is forbidden under 905(b).

c. The Fifth Circuit in Hess v. Upper Mississippi Towing Corporation, 559 F.2d 1030 (5th Cir. 1977) held that the employer of an independent contractor owes no duty to the employees of the independent contractor to insure that the independent contractor will take special precautions against unreasonable risks. The Second Circuit, however, in Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837 (2d Cir. 1977) at page

841, although not directly holding, implies that the duty would extend to the employee of the independent contractor.

It is respectfully submitted that the five years which have passed since the 1972 amendments have provided sufficient grist for the judicial mill in order that this Court may now definitively set out what law is to be applied in a suit by an injured longshoreman against the owner and operator of a vessel.

It is important to the resolution of this particular case to point out that at the time of the accident defendants were engaged in an ultrahazardous undertaking; that is, the transportation of a fume filled gasoline barge which could explode at any time for any number of reasons notwithstanding the exercise of due care. Thus, it is submitted that this case is

different from the typical loading-unloading situation which would not be ultrahazardous in the normal usage of the word.

I. THIS COURT SHOULD DETERMINE WHETHER 905(b) IS AN INJURED HARBOR WORKER'S EXCLUSIVE REMEDY.

Plaintiff contends that 905(b) is not his exclusive remedy for the reason that he has sued the owners and operators of the gasoline barge not as owners and operators but rather as corporations engaged in an ultrahazardous business venture. It is entirely immaterial to plaintiff's cause of action that defendants are connected with a vessel.

In Streach v. Associated Container Transport, Ltd., 388 F.Supp. 935, (C.D. Ca. 1975), the Court permitted an injured longshoreman to pursue an action in strict liability against a vessel under a products liability theory. The Court stated that "to be suable on a strict liability claim, a defendant must be in the business

of distributing the allegedly defective product to the public. If a vessel owner is in that business, the cause of action arises against him not qua vessel owner but qua provider of a defective product." The Fifth Circuit rejected the reasoning and it is submitted that it was in error to do so.

II. THE STANDARD OF CARE TO BE APPLIED UNDER SECTION 905(b) SHOULD BE THAT IMPOSED UNDER THE GENERAL MARITIME LAW.

The Court of Appeals held that the General Maritime Law is no longer applicable to Maritime personal injury cases involving harbor workers where suit is brought against the owner or operator of the vessel. The basis for this ruling was that Section 905(b) precludes application of the General Maritime Law. Plaintiff respectfully suggests that the proper standard of care to be applied in a Maritime personal injury action such as this would be the rule stated by

this Court in Kermarec v. Compagnie General Transatlantique, 358 U.S. 625 (1959) where it held that the standard of care to be applied in a personal injury action is reasonable care under the circumstances. As pointed out, the Third Circuit in Brown v. Ivarans Rederi, supra, has permitted application of Maritime law. Thus, there is a conflict among the Circuits on this issue.

III. IN THE ALTERNATIVE, IF LAND BASED LAW IS APPLICABLE TO PLAINTIFF'S ACTION, THE RESTATEMENT OF TORTS 2d, §§ 411, 413, 516, 423 AND 427, SET OUT A SOLID BASIS FOR IMPOSING LIABILITY.

Since the 1972 amendments many of the lower courts have turned to the Restatement of Torts 2d as a guide in formulating the law under a 905(b) action.

In this case, plaintiff shows that the following sections of the Restatement of Torts are particularly applicable to plaintiff's cause of action:

Section 411 imposes a duty upon the employer of an independent contractor to select a competent contractor.

Section 413 imposes a duty upon the employer of an independent contractor to take steps to insure that the independent contractor will take special precautions when performing work creating an unreasonable risk of harm.

Section 416 imposes liability on the employer of an independent contractor where the employer fails to take precautions to protect people from dangers inherent in the independent contractor's work.

Section 423 holds the employer of an independent contractor liable for damage caused by the independent contractor when the independent contractor is engaged in work which is highly dangerous.

Section 427 imposes liability upon the employer of an independent contractor

for injury caused as a result of the independent contractor's failure to take precautions with respect to work which is inherently dangerous.

The Fifth Circuit Court of Appeals has held that the foregoing sections cannot support plaintiff's action because plaintiff is not within the scope of the duty imposed upon the employer of an independent contractor. The Court states that these sections "cannot support plaintiff's action because he is an employee of the independent contractor, and the sections only impose liability with respect to the third party."

This ruling of the Court is contrary to the ruling of the Circuit Court for the District of Columbia in the case of Lindler v. District of Columbia, 502 F.2d 495 (1974). That case is particularly important because it interpreted the Longshoremen and Harbor Workers'

Compensation Act which is applicable to the District of Columbia. That case held that where one employs an independent contractor to do work of an inherently dangerous nature requiring special precautions (such as in this case), an employee of the independent contractor may recover from the hiring party for the latter's failure to take special precautions or require special precautions in the contract with the independent contractor.

This reasoning was also recognized by Judge Alvin Rubin, now of the Fifth Circuit, in Fitzgerald v. Compania Naviera la Molinera, 394 F. Supp. 413, 417 (E.D. La. 1975).

With this conflict in the law, and in particular because of the opposite result between the present case and Lindler, both of which interpret the Longshoremen and Harbor Workers'

Compensation Act, it is respectfully submitted that this Court should exercise its discretion to determine which rule of law should apply under a situation such as this involving ultrahazardous activities.

Where an inexperienced employee, such as plaintiff, is placed in an environment where he is exposed to the dangers inherent in the cleaning of gasoline barges; where he is required to follow the orders of his superiors without question; where his superiors have provided him with an inherently dangerous method of cleaning the barges which method is their standard procedure; where the barge owners have been present at the facility during cleaning operations; and where the barge owners have taken no steps to insure that proper procedures are followed, that a competent contractor was hired, or that the contract entered

into between it and the independent contractor require the taking of certain precautions, it is submitted that in such situations the employer of the independent contractor should be liable to an employee of the independent contractor who is injured because of dangers inherent in the ultrahazardous operations. Of all people the employee of the independent contractor should fall under the scope of the duty owed by the employer of the independent contractor as he will continuously be exposed to the dangers inherent in the ultrahazardous operations and he will have neither the knowledge nor any say in how the operation is to be conducted.

The result of the Fifth Circuit's decision in this matter is that the employer of the independent contractor owes no duty toward plaintiff. It is

submitted that such a position is in error and will not encourage those engaged in ultrahazardous marine activities to see that proper and safe procedures are followed in order that explosions such as this may be prevented.

CONCLUSION

It is respectfully suggested that a Writ of Certiorari issue directed to the Fifth Circuit Court of Appeals in order that this Court may put to rest the conflict among the circuits as to the applicable law to be applied in a 905(b) action.

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C E R T I F I C A T E

I hereby certify that three copies of the foregoing has been mailed this date, postage prepaid, to all counsel of record: David W. Robinson, P. O. Box 2995, Baton Rouge, Louisiana, 70821; and James A. George, P. O. Box 64949, Baton Rouge, Louisiana, 70896, on this 16 day of January, 1978.

Charles R. Moore

APPENDIX A

COURT OPINION

Before GEWIN, RONEY and HILL, Circuit Judges

RONEY, Circuit Judge:

The plaintiff worked for an independent contractor employed by defendants to "free" a barge of gasoline. An explosion burned him severely, and he sued the defendants, alleging failure to provide a safe place to work, negligent employment of an independent contractor, strict liability, and negligent maintenance of dangerous premises. At the close of plaintiff's evidence, the district court directed a verdict against him. On appeal, he alleges the district court misapplied the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 905(b) (Supp.1977), to foreclose his case. Because the Longshoremen's Act's compensation provisions afford the exclusive remedy for his injuries, we affirm.

The accident took place in 1973. Plaintiff's employer, Port Allen Marine,

operated a facility on the Mississippi River for cleaning barges used to transport petroleum products. Pentalex Barge Lines, Inc. delivered to Port Allen Marine a barge owned by Upper Mississippi Towing Corp. The barge had recently carried a cargo of high-grade gasoline, but was empty except for residual gasoline and vapors which Port Allen was hired to remove. While the plaintiff was using water to flush gasoline out of the barge's piping system, an explosion occurred which burned him severely. Plaintiff collected compensation benefits from Port Allen Marine under the Longshoremen's Act, and brought this tort action against the owner and the operator of the barge.

In directing a verdict, the district court found that, at the time of the accident, the barge was in the sole control of Port Allen Marine, a specialist in gas-freeing barges. The court held the defendants did not supervise the gas-freeing process, and were not apprised of any facts which would lead them to believe Port Allen Marine was not fully qualified for the job. On appeal, the

plaintiff alleges the court erred in limiting his cause of action to one stated by § 905(b) of the Longshoremen's Act; in not applying general maritime law under § 905(b); and in misapplying land-based law, including several sections of the Restatement (Second) of Torts (1965).

§ 905(b) EXCLUSIVE REMEDY

(1) The history of § 905(b) is important to the resolution of this case. The Longshoremen's Act provides compensation benefits to injured maritime workers. The Act forecloses negligence suits against the worker's immediate employer, but allows litigation against third parties. In the past, the Supreme Court adopted a liberal view of the third-party suit and held shipowners liable under a warranty of seaworthiness to injured employees of independent

contractors working on board the ship. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). The seaworthiness remedy went beyond negligence in two important respects. G. Gilmore & C. Black, The Law of Admiralty 542 (2d ed. 1975). First, the shipowner was liable for "transitory" defects which arose after his opportunity to correct them had passed. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960). Second, the shipowner was responsible for unsafe conditions caused entirely by the act of a third party, including the independent contractor. Alaska Steamship Co. v. Patterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed.2d 798 (1954). In 1972, however, Congress amended the Longshoremen's Act. Congress substantially raised the compensation benefits payable, eliminated the employee's unseaworthiness action and restricted his recovery from the shipowner to negligence. In the event of a negligence recovery against the vessel, the worker's employer would not be liable to the shipowner for such damages. On the other

hand, if the injury was caused by the negligence of the worker's employer engaged in repair service, no action is permitted against the vessel. The remedy provided by the statute against the vessel "shall be exclusive." The language of § 905(b) now provides:

> In the event of injury to a (maritime worker) caused by the negligence of a vessel, then such person. . . may bring an action against such vessel as a third party. . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . .If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or

> of a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

The language of the statute defeats the plaintiff's claim that § 905(b) is not his exclusive avenue of remedy. Furthermore, the elimination of the warranty of seaworthiness evinces congressional intent to curtail shipowner liability for conditions arising when the vessel is not within the owner's control and for injuries caused solely by independent contractors. Remaining is the maritime worker's right to sue for negligence only.

GENERAL MARITIME LAW UNDER § 905(b)

(2) The legislative history, as recently discussed by this Court in Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977), discloses an intent that the negligence action be a matter of uniform federal law, and, with certain exceptions, be designed to give the maritime worker the same rights against third parties as his land-based

counterparts would have. One articulation of those rights, Gay noted, is the Restatement (Second) of Torts (1965). Accordingly, the plaintiff's second allegation of error must also be rejected. General maritime law no longer governs third party actions by maritime workers except to the extent that the maritime concepts have an analogy in land-based law. For instance, the Committee expressly intended that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence would apply, and that the admiralty rule precluding "assumption of risks" as a defense would be applicable. But these concepts are not exclusively maritime, and do not alter the fact that general maritime law, as such, does not control outcome of these third party actions.

NEGLIGENCE UNDER LAND-BASED LAW CONCEPTS

To evaluate the plaintiff's third claim, that the court misapplied land-based law to the facts of this case, it is necessary to examine each of the plaintiff's theories of liability.

I. Duty to Provide a Safe Place to Work

The plaintiff invokes the doctrine that a shipowner has a duty to provide invitees with a safe place to work. To the extent that doctrine encompasses liability without fault, a maritime concept, it no longer applies under § 905(b). Gay, 546 F.2d at 1239; Bess v. Agromar Line, 518 F.2d 738 (4th Cir. 1975). The doctrine does, however, have a land-based counterpart based on negligence. See Prosser on Torts § 80 (4th ed. 1971); Annot., 31 A.L.R.2d 1375.

(3) In this case, however, the doctrine does not provide a basis for recovery by the plaintiff. Under traditional interpretation the duty to provide a safe place to work does not extend to protect employees of an independent contractor from dangers the contractor was hired to correct. Whitlow v. Seaboard Air Line R. R., 222 F.2d 57 (5th Cir. 1955). The plaintiff's reliance on Halecki v. United New York & N. J. Sandy Hook Pilots Ass'n, 302 F.2d 840 (2d Cir.), cert. denied, 371 U.S. 825, 83 S.Ct. 46, 9 L.Ed.2d 64 (1962), is misplaced. In that case the shipowner directed the con-

tractor's method of repair. Halecki v. United New York & N. J. Sandy Hook Pilots Ass'n, 282 F.2d 137, 142 (2d Cir. 1960), cert. denied, 364 U.S. 941, 81 S.Ct. 461, 5 L.Ed.2d 372 (1961). In contrast, the defendants here made no attempt to control the details of the work done by Port Allen Marine.

II. Duty on Employers of Independent Contractors

(4) Plaintiff alleges the district court misapplied several sections of the Restatement which impose liability on those who employ negligent independent contractors. See Restatement (Second) of Torts §§ 411, 413, 416, 423, 427 (1965). Freely admitting that Congress foreclosed any maritime liability of a shipowner to the employee of an independent contractor for negligence of that contractor, the plaintiff invokes land-based law which holds an employer responsible for negligence of his independent contractors when the work involves danger. He cites §411, which imposes a duty to select a contractor carefully, and §413, which says an employer should take steps to ensure that an independent

contractor will take special precautions when performing work creating a peculiar, unreasonable risk of harm. Plaintiff also cites several sections which impose vicarious liability on the employer. Included are §416, which imposes liability if the contractor ignores the employer's instructions and fails to take precautions; §423, which makes the employer equally liable with the contractor when the work involves maintaining an instrumentality used in highly dangerous activities; and §427, which imposes joint liability if the contractor fails to take precautions with respect to work involving inherent danger. These sections of the Restatement, however, cannot support the plaintiff's action because he is an employee of the independent contractor, and the sections only impose liability with respect to third parties.

The language of the cited sections is silent on this issue. While §411 envisions liability to "third persons," §§ 413, 416 and 427 speak in terms of responsibility to "others," a term which arguably could include the employees of

the independent contractor. Cf. Halecki v. United New York & N. J. Sandy Hook Pilots Ass'n, 282 F.2d 137, 139 (2d Cir. 1960), cert. denied, 364 U.S. 941, 81 S.Ct. 461, 5 L.Ed.2d 372 (1961) (employee of independent contractor covered under original Restatement of Torts § 344). But cf. Restatement (Second) of Torts § 344, comment c (duty is "for the protection of the public who enter").

In a series of opinions, the Tenth Circuit has interpreted this ambiguity to exclude employees of independent contractors from protection. Parsons v. Amerada Hess Corp., 422 F.2d 610 (10th Cir. 1970); Eutsler v. United States, 376 F.2d 634 (10th Cir. 1967); see United States v. Page, 350 F.2d 28 (10th Cir. 1965), cert. denied, 382 U.S. 979, 86 S.Ct. 552, 15 L.Ed.2d 470 (1966). The purpose for imposing a duty of care on the employer of an independent contractor is to ensure that his enterprise will bear the costs it creates, and will not escape liability for mishandling of inherently dangerous work by delegating it to an independent contractor. Eutsler reasoned that the employer's liability should not encompass injuries to the

employees of the independent contractor because, under workmen's compensation laws, the contractor is already strictly liable for their cost. As argued in Tentative Draft No. 7, Restatement (Second) of Torts 17-18 (1962):

> it is to be expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.

See Eutsler, supra, 376 F.2d at 636.

The plaintiff counters this argument by citing Lindler v. District of Columbia, 164 U.S.App.D.C. 35, 502 F.2d 495 (1974), a case in which the D.C. Circuit allowed an independent contractor's employee to recover from the contractor's employer under a common law theory similar to Restatement (Second) of Torts § 413. See also Fitzgerald v. Compania Naviera La Molinera, 394 F.Supp. 413, 417 (E.D. La. 1975) (dictum). The D.C. Circuit rejected the reasoning of the note in the Tentative Draft. The court observed the note was not included

in the final version of Restatement (Second), and said the courts should not assume costs would be passed to the employer when the employer had no legal duty to pay them. 502 F.2d at 499. Because the Longshoremen's Act is the workmen's compensation statute for the District of Columbia, the court also gave weight to several cases stating a policy favoring liberal construction of the Act to favor third party suits by injured employees. See, e.g., Potomac Electric Power Co. v. Wynn, 120 U.S.App.D.C. 13, 343 F.2d 295 (1965).

Lindler, however, represents a minority view of land-based law which has been undermined by the 1972 amendments to the Longshoremen's Act. The Lindler accident took place in 1970. The subsequent amendments to the Act expressly rejected the line of cases favoring third party suits upon which Lindler relied. Congress eliminated the shipowner's no-fault liability for unseaworthiness, and stated that land-based legal principles were to control the liability of third parties. To the extent the present Longshoremen's Act

creates any special rules which affect the liability of those who hire independent contractors, it argues against employee suits. The Longshoremen's Act employer, unlike his land-based counterpart, cannot seek a contractual indemnity from the independent contractor whose negligence caused the injury. See 33 U.S.C.A. § 905(b) (Supp. 1977). Furthermore, Congress intended for the rights of an employee to be the same whether he was hired by an independent contractor or was employed directly by the shipowner. Smith v. M/V Captain Fred, 546 F.2d 119, 123 (5th Cir. 1977); cf. Restatement (Second) of Torts § 423 (1965) (employer's liability to be same as contractor's liability). It makes little sense to allow a suit for negligent supervision of an independent contractor when liability for negligent supervision of the employer's own employees would be foreclosed by the compensation statute. The statute itself indicates that an employee hired by the ship directly cannot sue the ship for injury "caused by the negligence of persons engaged in providing. . . repair

services to the vessel." 33 U.S.C.A. § 905(b) (Supp. 1977). The Committee reports indicate the word "persons" not only included fellow servants, but was also intended to include the shipowner in his capacity as an employer of the workers doing the repair work. G. Gilmore & C. Black, The Law of Admiralty 450 (2d ed. 1975); see H.R. 92-1441, 92d Cong., 2d Sess. (1972), reprinted in (1972) U.S. Code Cong. & Admin. News, pp. 4698, 4705.

Lindler also represents a minority view among the federal circuits. Congress intended a uniform federal interpretation of § 905(b). For this Circuit to follow Lindler would militate against uniformity. As noted above, the Tenth Circuit has twice held the employee of an independent contractor cannot recover from the employer of the contractor. Eutsler, supra, 376 F.2d at 634, Parsons, supra, 422 F.2d at 610. In Eutsler, the court said that although the relevant language of the Tentative Draft was not included in the final Restatement (Second), the language had nevertheless become an accepted part of the judicial

gloss on the text. 376 F.2d at 636. Both cases involved situations where the court was not bound by applicable state law and so was free to determine the most desirable rule. Confronted with a similar opportunity, the Second Circuit reached the same conclusion. Lipka v. United States, 369 F.2d 288 (2d Cir. 1966), cert. denied, 387 U.S. 935, 87 S.Ct. 2061, 18 L.Ed.2d 997 (1967). The Eighth Circuit has split. In its most recent case, the Circuit affirmed a district court decision concluding that, as a matter of general law, the employee should not recover. Olson v. Red Wing Shoe Co., 456 F.2d 1299 (8th Cir. 1972), aff'g Olson v. Kilstofte & Vosejpka, Inc., 327 F.Supp. 583 (D.Minn. 1971). In an earlier case, however, the Eighth Circuit assumed without discussion that the opposite rule would apply. Associated Engineers v. Job, 370 F.2d 633, 647 (8th Cir. 1966), cert. denied sub nom., Troy Cannon Const. Co. v. Job, 389 U.S. 823, 88 S.Ct. 59, 19 L.Ed.2d 77 (1967), followed in Hagberg v. City of Sioux Falls, 281 F.Supp. 460 (D.S.D. 1968). The Fifth Circuit, interpreting language

in 27 Am. Jur. Independent Contractors § 39 which parallels that of the Restatement, has held the employee cannot recover. Corban v. Skelly Oil Co., 256 F.2d 775 (5th Cir. 1958). Applying the Restatement under the influence of a binding state decision, two other Circuit decisions have also denied recovery. Sword v. Gulf Oil Co., 251 F.2d 829 (5th Cir.), cert. denied, 358 U.S. 824, 79 S.Ct. 41, 3 L.Ed.2d 65 (1958) (Texas); Craig v. Olin Mathieson Chemical Corp., 427 F.2d 962 (7th Cir.), cert. denied, 400 U.S. 964, 91 S.Ct. 365, 27 L.Ed.2d 383 (1970) (Illinois). Two decisions applying the law of other states have reached the opposite conclusion. United States v. DeCamp, 478 F.2d 1188 (9th Cir.), cert. denied, 414 U.S. 924, 94 S.Ct. 232, 38 L.Ed.2d 158 (1973) (California); Grogan v. United States, 341 F.2d 39 (6th Cir. 1965) (Kentucky) (dictum).

III. Strict Liability

(5) The plaintiff also asserts that because gas-freeing a vessel is "ultra-hazardous," the barge owner should be strictly liable for his damages under

Restatement (Second) of Torts § 519 (1977). Again, however, plaintiff's status as an employee of the independent contractor defeats his claim. He cannot sue Port Allen Marine for strict liability because it has paid compensation benefits, 33 U.S.C.A. § 905(a) (Supp. 1977). He cannot sue the defendants because the Longshoremen's Act only allows him to sue them for their "negligence," a phrase which on its face does not encompass strict liability. See Dalehite v. United States, 346 U.S. 15, 44-45, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (Federal Tort Claims Act). The congressional committee reports accompanying the 1972 amendments emphasize an intent to eliminate unseaworthiness, a strict liability concept, and to limit the liability of the shipowner to injuries for which the shipowner was at fault. It would be inappropriate to judicially read strict liability into the text of the statute in view of obvious congressional intent. See Brown v. Ivarans Rederi A/S, 545 F.2d 854, 861 (3d Cir. 1976), cert. denied, ____ U.S. _____, 97 S.Ct. 1652, 52 L.Ed.2d. 361 (1977) (vicarious liability

inappropriate under § 905(b)). Contra Streach v. Associated Container Transport, Ltd., 388 F.Supp. 935, 940 (C.D. Cal. 1975); 29 A.L.R.Fed. 771 (1976).

IV. Duty to Maintain Premises Safe for Invitees

(6) The plaintiff alleges that even though the gasoline was an "open and obvious" danger, the defendants are liable as landlords who failed to take due care with respect to a dangerous condition aboard their barge. Restatement (Second) of Torts §§ 343, 343A (1965). Gay, in dictum, recognizes such a cause of action if invitees aboard the vessel, though aware of the danger, either could not appreciate it or could not avoid it. Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977), dealt with these Restatement sections in a case where the plaintiff employee of an independent contractor was cleaning the cargo hold of defendant's vessel. A dangerous condition developed and plaintiff was injured by a falling rack. The Court held that even if the ship's crew were aware of the danger, there could be no duty owed by the ship where the

hazardous condition was created by the stevedore's employees, and the ship's personnel were less capable of abating the danger than the independent contractor's employees.

Here the danger inherent in removing gasoline and fumes from a barge was well known to all concerned. At oral argument the Court was informed that the reason for placing Port Allen Marine on a remote stretch of the Mississippi River was to limit the possible damage an explosion would cause. The facts of this case present no basis for imposing a duty of care on the defendants. Port Allen Marine was found by the trial court to be a specialist possessing expertise in "gas-freeing" barges. As in Brown, the plaintiff here was "the person best able to appreciate the potential consequences of the danger." 550 F.2d at 334. The precise reason for plaintiff's employment was to make an unsafe condition safe.

V. Limitation of Testimony

(7,8) Plaintiff's final contention is that the trial court erred in refusing to allow expert testimony concerning the

design of the barge. While the plaintiff correctly asserts that exclusion of the doctrine of unseaworthiness does not prevent recovery for actual negligence in vessel design, the plaintiff misapprehends the ruling of the trial court. The court questioned the expert, who stated the barge had a customary design and was reasonably fit for its intended purpose. The trial court concluded that the expert had established the vessel was not negligently designed, and that any critical testimony he might give would go to unseaworthiness. The court then correctly held such testimony inadmissible.

AFFIRMED.

CAPTION DELETED APPENDIX B

D E N I A L October 25, 1977

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

EDWARD W. WADSWORTH
Clerk

**On behalf of appellant, Phillip Hess,

CAPTION DELETED APPENDIX C

J U D G M E N T

This cause came before the Court and a jury for trial, Honorable E. Gordon West, District Judge, presiding, and the jury having found for defendants by direction of the court at the close of plaintiff's case,

IT IS ORDERED AND ADJUDGED that judgment be entered herein in favor of defendants, Upper Mississippi Towing Corp., Penlatex Barge Lines, Inc., and Marine Office-Appleton & Cox Corp., and against plaintiff, Phillip Hess, dismissing plaintiff's case at his cost.

Baton Rouge, Louisiana, October 21, 1975.

Charles Benton
APPROVED: CLERK

E. Gordon West
UNITED STATES DISTRICT JUDGE

APPENDIX D

RESTATEMENT OF TORTS 2d - 1965

411. Negligence in Selection of Contractor

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

a. to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

b. to perform any duty which the employer owes to third persons.

413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

a. fails to provide in the contract that the contractor shall take such precautions, or

b. fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

416. Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

423. Making or Repair of Instrumentalities Used in Highly Dangerous Activities

One who carries on an activity which threatens a grave risk of serious bodily harm or death unless the instrumentalities used are carefully constructed and maintained, and who employs an independent contractor to construct or maintain such instrumentalities, is subject to the same liability for physical harm caused by the negligence of the contractor in constructing or maintaining such instrumentalities as though the employer had himself done the work of construction or maintenance.

427. Negligence as to Danger Inherent in the Work

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.